STATE OF MICHIGAN

COURT OF APPEALS

ALBERT W. HILL,

Plaintiff-Appellant,

v

DEBRA L. HILL,

Defendant-Appellee.

UNPUBLISHED
January 14, 2003

No. 242102
Kent Circuit Court
LC No. 99-010581-DM

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

In this divorce action, plaintiff Albert Hill appeals by right the trial court's opinion and order granting defendant Debra Hill physical custody of the parties' two minor children. We affirm.

The parties were married in June 1989. The children who are the subjects of this custody dispute were born in 1990 and 1992.[1] Throughout the marriage, the parties separated several times, and permanently separated in 1998. It is acknowledged that plaintiff had a drinking problem throughout this time. In October 1999, plaintiff filed a complaint for separate maintenance and sought custody of the two children, allegedly because of the filthy conditions in which the children were living with defendant. The court thereafter granted plaintiff temporary custody and the children resided with plaintiff and plaintiff's mother.

A three-day trial was held, at which testimony was given regarding custody of the children. Following trial, the court determined that neither party could claim an established custodial environment. After considering the factors laid out in the Child Custody Act, MCL 722.21 *et seq*., the court granted physical custody of the children to defendant.

Plaintiff first argues that the trial court erred in concluding that no established custodial environment existed and that the court erroneously applied the burden of proof applicable to cases in which no established custodial environment exists rather than that applied when an established custodial environment does exist. Three different standards of review are applicable to child custody cases. The trial court's interpretation or application of the existing law is reviewed for clear error. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001).

[1] Defendant also had two sons from a previous relationship who resided with her.

Findings of fact are reviewed under the great weight of the evidence standard. This Court will sustain the trial court's factual findings unless "'the evidence clearly preponderates in the opposite direction.'" *Id*. at 5, quoting *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). Discretionary rulings, including the trial court's determination on the issue of custody, are reviewed for an abuse of discretion. *Foskett*, *supra* at 5.

When the trial court is confronted with a petition to change custody, the court must first determine the appropriate burden of proof to place on the party seeking the change. *Foskett*, *supra* at 5. The court's initial inquiry is whether an established custodial environment exists. *Id*. Whether a custodial environment has been established is an intense factual inquiry. *Id*. at 6.

The trial court did not err in determining that the children did not have an established custodial environment. An established custodial environment is one of significant duration in which the relationship is marked by qualities of security, stability and permanence. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). The testimony at trial established that the children viewed defendant as the primary caregiver and looked to defendant for such things as love, guidance, support, structure and security. The trial court determined that although the children had lived in the same household as plaintiff for the preceding eighteen months and plaintiff provided for their material needs, the children looked to defendant to meet their emotional needs. The court noted that it was plaintiff's mother, rather than plaintiff, who had actively fulfilled the role of homemaker for the children and had provided a great deal of parenting. Moreover, although the children developed an emotional connection with plaintiff while living with him, the children expected to return to defendant's care. The testimony at trial did not clearly preponderate in plaintiff's direction. Accordingly, the trial court did not err in finding that no established custodial environment existed.

Absent a showing of an established custodial environment, the trial court is free to award custody to either parent, on a showing of the preponderance of the evidence that the child's best interest called for a change of custody. *Foskett*, *supra* at 6-7; *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991).[2] The evidence established that the children looked to defendant as

[2] The Child Custody Act, MCL 722.21 *et seq*. sets out the factors used to determine the best interests of the child:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(continued…)

their primary caregiver. The children sought to return to defendant's care and to reside with their half-siblings. Maintenance of a sibling bond is an appropriate consideration in determinations of custody. *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998). Plaintiff did make a great effort to become sober and care for his children; however, he relied heavily on his mother to care for the children and he spent a considerable amount of time on his racing hobby. The court did not err in finding that the preponderance of the evidence showed it was in the children's best interests for defendant to have physical custody.

Plaintiff also argues the trial court abused its discretion in admitting certain evidence under MRE 804(b)(7) (formerly MRE 804(b)(6)). This evidence consisted of a letter written by the preventive services worker who had been assigned to work with defendant. The letter concerned the condition of defendant's home and stated that the worker found the home to be organized, clean and adequately furnished. Plaintiff asserts the letter was inadmissible because the witness was not unavailable and because the letter was unreliable.

We note initially that beyond mere citation to the rules of evidence, plaintiff cites no authority and little support for his argument. A party may not merely announce his position and leave it to this Court to discover and rationalize a basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of authority, *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). However, we will briefly address the merits of this issue.

(…continued)

> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

MRE 804(a)(5) states that "unavailability as a witness" includes situations where the declarant is absent from a hearing and the proponent of the statement has been unable to procure the declarant's attendance. The witness in this case was absent from the proceedings because she went on vacation. Defendant was unable to procure her attendance, despite formally serving her with process and despite telephoning her before trial to ensure her presence at trial.

MRE 804(b)(7), provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . A statement not covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

A hearsay statement under MRE 804(b)(7) must show a particularized guarantee of trustworthiness. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2001).

Here, the court considered the totality of the circumstances in admitting the letter into evidence. The court noted its own familiarity with the witness and knowledge of her credibility and considered the need to do what was in the best interests of the children. Further, the court noted plaintiff's lack of opportunity to cross-examine the witness and considered this fact in determining the weight to accord the evidence. Under the circumstances, the trial court did not abuse its discretion in admitting the letter into evidence.

Even if the trial court had erred in admitting the evidence, there is no reasonable probability that the error affected the outcome of trial. It is unclear how much weight, if any, the trial court gave this evidence. At trial, defendant admitted that her house was unkempt and in disarray when the children were removed from her custody. However, there was evidence produced that defendant improved the situation. There is no basis to conclude that the admission of the letter affected the outcome of this case.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot